

KAREN A. CONNOLLY, LTD.

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6 **UNITED STATES DISTRICT COURT**

7 **DISTRICT OF NEVADA**

8 UNITED STATES OF AMERICA,

9 Plaintiff,

10 vs.

11 JAN ROUVEN FUECHTENER,

12 Defendant.


CASE NO.: 2:16-CR-100-GMN-CWH

**SECOND REQUEST TO WITHDRAW
GUILTY PLEA**

13
14 Defendant herein, JAN ROUVEN FUECHTENER, by and through his attorney of record,
15 KAREN A. CONNOLLY, of the law office of KAREN A. CONNOLLY, LTD., hereby files this
16 ***Motion to Withdraw Guilty Plea.*** This motion is made and based upon the pleadings and papers on
17 file herein, the following Points and Authorities and any evidence adduced at the time of any hearing
18 in this matter.

19 DATED this 10 day of August, 2018.

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MEMORANDUM OF LAW

On November 17, 2016, on what was to be the fourth day of his trial, Defendant Jan Rouven Fuechtener (hereinafter “Rouven”) pled guilty to Possession of Child Pornography in violation of 18 US Sec 2252 (a)(5)(B); Receipt of Child Pornography in violation of 18 USC Sec. 2252(a)(2) and (b); and Distribution of Child Pornography in violation of 18 USC Sec 2252 (A)(2) and (b). Rouven now seeks to withdraw his plea.

The standard under Federal Rule of Criminal Procedure 11 for withdrawing a plea is extremely liberal, and instructs that, “A defendant may withdraw a plea of guilty or nolo contendere . . . after, the court accepts the plea, but before it imposes sentence if . . . the defendant can show a fair and just reason for requesting the withdrawal.” Fed. R. Crim. P. 11(d)(2)(B) In the Ninth Circuit, leave to withdraw a plea prior to the imposition of sentence “should be freely granted” wherever a “fair and just” reason is presented. *United States v. Navarro-Flores*, 628 F.2d at 1184 (citing *United States v. Webster*, 468 F.2d 769, 771 (9th Cir. 1972); *Kadwell v. United States*, 315 F.2d 667, 670-71 (9th Cir. 1963)). A defendant need only present a “plausible reason” for withdrawal prior to the imposition of sentence. *Navarro-Flores*, 628 F.2d at 1184 (citing *Kercheval v. United States*, 274 U.S. 220, 224 (1927); *United States v. Erlenborn*, 438 F.2d 165, 168 (9th Cir. 1973)). “Such a motion should be considered liberally in favor of the accused.” *United States v. Artabane*, 868 F. Supp. 76, 77 (M.D. Pa. 1994) (citing *United States v. Young*, 424 F.2d 1276, 1279 (3rd Cir.1970)).

This request to withdraw the guilty plea is made and based upon the fact that the guilty plea agreement violates the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution in accordance with the *Davenport Rule* established in *United States v. Davenport*, 519 F.3d 940 (9th Cir. 2008.) In *Davenport*, the Ninth Circuit held that the offense of possession of child pornography (18 U.S.C. § 2252A(a)(5)(B)), is a lesser included offense of receipt of child pornography (18 U.S.C. § 2252A(a)(2)). Under the Double Jeopardy Clause of the Fifth Amendment, it is a constitutional error to enter a conviction against a defendant for both receipt and possession of child pornography for the same conduct. *Id.* Under the terms of the guilty plea agreement, Rouven pled guilty to both receipt and possession of child pornography

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Where separate conduct supports each offense, the Fifth Amendment 's Double Jeopardy Clause is not implicated. *United States v. Overton*, 573 F.3d 679, 695 (9th Cir. 2009); see also, *United States v. Schales*, 546 F.3d 965, 978 (9th Cir. 2008). In the context of child pornography, a defendant may be convicted both of receipt of one image and possession of another image, or for receipt of an image on a hard drive and possession of the same image on a compact disc, but not for receipt and possession of the same image on the same device. *Id.*

To avoid offending the Double Jeopardy Clause, when prosecuting a defendant both for a crime and a lesser-included offense, the government "must distinctly set forth" the criminal activity that forms the basis of each count. *Id.* 546 F.3d 965. The guilty plea charges both possession and receipt of child pornography. A prosecutor may pursue both receipt and possession convictions in a child pornography case by specifying the different criminal acts that form the basis of each count. *United States v. Johnston* 789 F.3d 934 (9th Cir. 2015). That was not done in the case at bar: The plea agreement does not distinctly set forth separate facts in support of the charge of possession and receipt respectively. Thus the guilty plea agreement violates the Double Jeopardy Clause and is invalid. See, *United States v. Davenport*, 519 F.3d 940 (9th Cir. 2008). *United States v. Schales*, 546 F.3d 965, 978 (9th Cir. 2008) *United States v. Johnston* 789 F.3d 934 (9th Cir. 2015).

Accordingly, Jan Rouven Fuechtener should be permitted to withdraw his guilty plea since it violates the Fifth Amendment to the United State Constitution.

DATED this 17 day of August, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of KAREN A. CONNOLLY, LTD., and on the 10 day of August, 2018, I served a true and correct copy of the above and foregoing *Second Request to Withdraw Guilty Plea* via the CM/ECF system upon the following:

☒ by depositing the same in the U.S. Mail, First Class Mail, with postage fully prepaid, at Las Vegas, Nevada, addressed as follows:

Cristina D. Silva, United States Attorney
Daniel D. Hollingsworth, United States Attorney
Elham Roohani, United States Attorney
Lisa Cartier-Giroux, United States Attorney
Mark E. Woolf, United States Attorney


an Employee of KAREN A. CONNOLLY, LTD.